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IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL ALLAN WOODS,)	
)	
Plaintiff/Respondent,)	Supreme Court Case No. 37483-2010
)	
v.)	
)	BRIEF OF RESPONDENT
)	
SUSAN SANDERS,)	
)	
Defendant/Appellant.)	
_____)	

**Appeal from the District Court of the Fifth Judicial District of the State of Idaho,
in and for the County of Gooding**

Honorable Casey Robinson, Magistrate

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES	i
I. STATEMENT OF THE CASE	1
a. Nature of the Case	1
b. Course of Proceedings	1
c. Statement of Facts.....	2
II. ISSUES RESTATED ON APPEAL.....	3
III. LAW	3
a. Standard of Review.....	3
b. Standards for Pro Se Litigants	4
IV ARGUMENT	
a. Appellant Waived Any Objection By Failing To Present Evidence At The Trial In This Matter	5
b. Appellant's Frivolous Conduct Mandated An Award Of Attorneys Fees And Costs By The Magistrate Court	6
c. Idaho Rule of Civil Procedure 40(c) Was Properly Complied With	8
d. Proper Notice Was Given To Appellant Throughout The Course Of The Proceedings.....	9
e. Appellant's Frivolous Appeal Warrants Attorneys Fees Pursuant To Idaho Appellate Rule 41, Idaho Appellate Rule 11.2 and Idaho Code Section 12-121	9
V. CONCLUSION	12
CERTIFICATE OF MAILING	13

TABLE OF CASES AND AUTHORITIES

Cases

<i>Balderson v. Balderson</i> , 127 Idaho 48, 896 P.2d 956 (1995)	10
<i>Bingham v. Montane Resource Assocs.</i> , 133 Idaho 420, 987 P.2d 1035 (1999)	11
<i>Blaser v. Cameron</i> , 121 Idaho 1012, 829 P.2d 1361 (Ct. App. 1991)	11
<i>Cook v. State Dep't of Transp.</i> , 133 Idaho 288, 985 P.2d 1150 (1999)	11
<i>Crowley v. Critchfield</i> , 145 Idaho 509, 181 P.3d 435 (Idaho 2007)	5, 6, 8
<i>Danti v. Danti</i> , 146 Idaho 929, 204 P.3d 1140 (2009)	3, 4
<i>Hoppe v. McDonald</i> , 103 Idaho 33, 644 P.2d 355 (1982)	5, 6, 8, 11
<i>Keller v. Rogstad</i> , 112 Idaho 484, 733 P.2d 705 (1987)	10
<i>King v. King</i> , 137 Idaho 438, 50 P.3d 453 (2002)	4
<i>McGrew v. McGrew</i> , 139 Idaho 551, 82 P.3d 833 (2003)	7
<i>Michalk v. Michalk</i> , 220 P.3d 580 (Idaho 2009)	4
<i>Nelson v. Nelson</i> , 144 Idaho 710, 170 P.3d 375 (2007)	3, 4, 6, 10
<i>Read v. Harvey</i> , 147 Idaho 364, 209 P.3d 661 (2009)	10
<i>Sammis v. Magnetek, Inc.</i> , 130 Idaho 342, 941 P.2d 314 (1997)	4
<i>Samuel v. Hepworth, Nungester & Lezamiz</i> , 134 Idaho 84, 996 P.2d 303 (2000)	11
<i>Sinclair & Co. v. Gurule</i> , 114 Idaho 362, 757 P.2d 225 (Ct. App. 1988)	11
<i>Suits v. Nix</i> , 141 Idaho 706, 117 P.3d 120 (2005)	4
<i>Twin Falls County v. Coates</i> , 139 Idaho 442, 80 P.3d 1043 (2003)	4
<i>Weaver v. Serle Bros.</i> , 131 Idaho 610, 962 P.2d 387 (1998)	11
<i>Wheeler v. Idaho Dept. of Health & Welfare</i> , 147 Idaho 257, 207 P.3d 988 (2009) ...	5, 6, 7, 8, 9

Statutes

Idaho Code Section 12-121	10, 11
---------------------------------	--------

Rules

I.R.C.P. 54(e)(1)	10
I.A.R. 11.2	10
I.A.R. 35(b)(6)	11

I

STATEMENT OF THE CASE

a. Nature of the Case

This case comes before this Honorable Court based upon a child custody modification proceeding before the Honorable Casey U. Robinson, Magistrate Judge of the Fifth Judicial District In and For the County of Gooding. Respondent filed a motion to modify the parties' child custody decree based upon a material and permanent change of circumstances and sought to have the court grant him sole legal and physical custody of the parties' minor child. Appellant was properly served and had notice of modification proceeding in this matter but failed to attend any hearings resulting in the Magistrate Court granting the Appellant sole legal and physical custody of the parties' son after trial in this matter. Appellant seeks to re-litigate the underlying custody determination before the Idaho Supreme Court and introduce ancillary documents and issues before this Honorable Court that were not properly raised below or part of this Court's record.

b. Course of Proceedings

On September 15, 2006, the Magistrate Court entered an *Order and Judgment of Custody* between the parties whereby both parties were awarded joint legal and physical custody. (R., 000052). A subsequent stipulated *Order in Re: Interim Custody* was entered on February 11, 2008. (R., 000066).

On February 4, 2009, Respondent filed his *Motion To Modify Child Custody* along with his *Affidavit* and *Ex-Parte Motion For Temporary Custody*. (R., 000074, R., 000088, R., 000078). The Magistrate Court entered its *Immediate Custody Order and Prohibitive Order* and *Temporary Restraining Order and Temporary Custody Order, Order to Show Cause and Notice of Hearing* on February 5, 2009. (R., 000081, R., 000125). Thereafter, the court entered its

Order For Temporary Custody and Visitation granting the Respondent sole legal and physical custody until final hearing on the matter. (R., 000128).

Respondent's *Motion To Modify Child Custody* was set for trial in this matter on March 3, 2010. (R., 000074). Appellant failed to show up or otherwise defend against Respondent's motion and as a result thereof, the Magistrate Court entered its *Order Modifying Custody and Visitation* on March 4, 2010, which vested the Respondent with sole legal and physical custody. (R., 000259). Similarly, as a result of the Appellant's conduct in this case, the Magistrate Court entered a *Judgment For Costs and Attorneys Fees* in favor of the Respondent due to the Appellant's frivolous conduct. (R., 000263). During the proceedings in this case, the Appellant filed several appeals to the Supreme Court, including but not limited to a premature *Notice of Appeal* to Supreme Court on March 1, 2010 and the *Notice of Appeal* on April 27, 2010 (R., 000215, R., 000285).

c. Statement of Facts

On February 4, 2009, Respondent filed his *Motion to Modify Child Custody*. (R., 000074). The Appellant was duly served with *Motion to Modify Child Custody* along with every other document filed on behalf of the Respondent in this case. (R., 000074). Since February 4, 2009, until the case was granted permissive appeal by the Idaho Supreme Court, the Appellant has not shown up to any proceeding in this matter and has had nearly all of her pleadings and those of her husband who is not a party to this action, stricken by the Magistrate Court by its *Order Granting Plaintiff's Motion Strike and Judgment for Attorney Fees* on February 3, 2010 and *Order Granting Plaintiff's Motion Strike and Judgment for Attorney Fees* on February 22, 2010. (R., 000139, R., 000144). Simply stated, the Appellant did not defend against the *Motion to Modify Child Custody* when it was set for trial in this matter and a result of her failure to

appear or otherwise defend against the motion, the Magistrate Court granted the Respondent sole legal and physical custody of the child in its March 4, 2010, *Order Modifying Custody and Visitation*. (R., 00074, R., 000259). As a result of the Appellant failing to defend and failing to articulate any reasonable basis the court should not grant the Respondent sole legal and physical custody along with her frivolous position she maintained in this matter, the Magistrate Court granted attorneys fees and costs against the Appellant pursuant to Idaho Code Section 12-121. (R., 000263).

II

ISSUES RESTATED ON APPEAL

Appellant has listed numerous issues on appeal; however, Respondent rephrases the issues on appeal as the following:

- a. Whether the Magistrate Court Abused Its Discretion in Awarding Respondent Sole Legal and Physical Custody.
- b. Whether the Magistrate Court Properly Awarded Attorneys Fees and Costs.
- c. Whether Idaho Rule of Civil Procedure 40(c) Was Complied With.
- d. Whether Proper Notice Was Given To Appellant Of The Hearing.
- e. Whether Appellant's Frivolous Appeal Warrants Attorneys Fees Pursuant to Idaho Appellate Rule 41, 11.2 and Idaho Code Section 12-121.

III

LAW

a. Standard of Review.

Child custody determinations are committed to the sound discretion of the magistrate judge. *Danti v. Danti*, 146 Idaho 929, 934, 204 P.3d 1140, 1145 (2009). A custody award will not be regarded as an abuse of discretion so long as the trial court: (1) recognized the issue as

one of discretion; (2) acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices; and (3) reached its decision through an exercise of reason. *Id.* An abuse of discretion occurs when the evidence is insufficient to support a magistrate's conclusion that the interests and welfare of the children would be best served by a particular custody award or modification. *Nelson v. Nelson*, 144 Idaho 710, 713, 170 P.3d 375, 378 (2007). A magistrate's findings of fact, however, will be upheld if they are supported by substantial and competent evidence and are not clearly erroneous. *Danti*, 146 Idaho at 934, 204 P.3d at 1145. If the findings of fact are based on substantial evidence, even if the evidence is conflicting, they will not be overturned on appeal. *Nelson*, 144 Idaho at 713, 170 P.3d at 378. Evidence is substantial "if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven." *King v. King*, 137 Idaho 438, 442, 50 P.3d 453, 457 (2002). When reviewing a magistrate's findings of fact, we view the evidence in favor of the magistrate's judgment and will uphold the magistrate's findings even if there is conflicting evidence. *Nelson*, 144 Idaho at 713, 170 P.3d at 378. We will not make credibility determinations or replace the trial court's factual findings by reweighing the evidence. *Id.*

b. Standards for Pro Se Litigants.

Pro se civil litigants are not accorded special latitude merely because they chose to proceed through litigation without the assistance of an attorney. *Michalk v. Michalk*, 220 P.3d 580, 585 (Idaho 2009). "Pro se litigants are held to the same standards and rules as those represented by an attorney." *Suitts v. Nix*, 141 Idaho 706, 709, 117 P.3d 120, 123 (2005) (quoting *Twin Falls County v. Coates*, 139 Idaho 442, 445, 80 P.3d 1043, 1046 (2003)). Moreover, "Pro se litigants are not accorded any special consideration simply because they are

representing themselves and are not excused from adhering to procedural rules." *Nelson*, 144 Idaho at 718, 170 P.3d at 383 (citing *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997)).

IV

ARGUMENT

a. Appellant Waived Any Objection By Failing To Present Evidence At The Trial In This Matter.

A party may not remain silent as to claimed error during a trial and later urge his objections thereto for the first time on appeal." *Hoppe v. McDonald*, 103 Idaho 33, 35, 644 P.2d 355, 357 (1982). In addition, "[s]ubstantive issues will not be considered the first time on appeal." *Crowley v. Critchfield*, 145 Idaho 509, 181 P.3d 435 (Idaho 2007). "The longstanding rule of this Court is that we will not consider issues that are raised for the first time on appeal." *Id.* Similarly, this Court has held that issues on appeal that are not supported by propositions of law or authority are deemed waived and will not be considered. *Wheeler v. Idaho Dept. of Health & Welfare*, 147 Idaho 257, 266, 207 P.3d 988, 997 (2009). I.A.R. 35(a)(6) requires that "[t]he argument . . . contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefore, with citations to the authorities, statutes and parts of the transcript and record relied upon." Because the record is silent as to the nature of Appellant's contentions in this matter, Appellant's argument is barred. See *Wheeler*, 147 Idaho at 266, 207 P.3d at 997.

In this matter, the Appellant has failed to cite to anything in the record which contradicts the *Order Modifying Custody and Visitation*. (R., 000259). Appellant failed to attend the trial in the matter, failed to challenge any evidence put forth to the court and failed to cite anything in the record which contradicts the Magistrate Court's findings. In essence, the Appellant cannot

claim error to the court's findings when the Appellant failed to show up to the trial set forth in the matter. *Hoppe v. McDonald*, 103 Idaho 33, 35, 644 P.2d 355, 357 (1982). Thus, Appellant has failed to comply with I.A.R. 35(a)(6).

Without any logical citation to the settled record in this matter, Appellant cannot point to one claim of error that occurred during the trial in this matter. It is the Appellant's burden in this case to show the Magistrate Court abused its discretion in this matter since a custody award will not be regarded as an abuse of discretion so long as the trial court: (1) recognized the issue as one of discretion; (2) acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices; and (3) reached its decision through an exercise of reason. *Danti v. Danti*, 146 Idaho 929, 934, 204 P.3d 1140, 1145 (2009). An abuse of discretion occurs when the evidence is insufficient to support a magistrate's conclusion that the interests and welfare of the children would be best served by a particular custody award or modification. *Nelson v. Nelson*, 144 Idaho 710, 713, 170 P.3d 375, 378 (2007). Simply stated, Appellant has not cited to any such abuse of discretion when she failed to show up to the trial in this matter, let alone cite to any transcripts or pleadings which evidence otherwise. Therefore, given the utter lack of Appellant's ability to meet her burden, along with the record to the contrary, this court must uphold the findings of the Magistrate Court in its *Order Modifying Custody and Visitation*. (R., 000259).

b. Appellant's Frivolous Conduct Mandated An Award Of Attorneys Fees And Costs By The Magistrate Court.

A party may not remain silent as to claimed error during a trial and later urge his objections thereto for the first time on appeal." *Hoppe v. McDonald*, 103 Idaho 33, 35, 644 P.2d 355, 357 (1982). In addition, "[s]ubstantive issues will not be considered the first time on appeal." *Crowley v. Critchfield*, 145 Idaho 509, 181 P.3d 435 (Idaho 2007). "The longstanding

rule of this Court is that we will not consider issues that are raised for the first time on appeal." *Id.* Similarly, this Court has held that issues on appeal that are not supported by propositions of law or authority are deemed waived and will not be considered. *Wheeler v. Idaho Dept. of Health & Welfare*, 147 Idaho 257, 266, 207 P.3d 988, 997 (2009). I.A.R. 35(a)(6) requires that "[t]he argument . . . contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefore, with citations to the authorities, statutes and parts of the transcript and record relied upon." Because the record is silent as to the nature of Appellant's contentions in this matter, Appellant's argument is barred. See *Wheeler*, 147 Idaho at 266, 207 P.3d at 997.

Appellant's conduct at trial level resulted in the Magistrate Court entering its *Order Modifying Custody and Visitation and Judgment For Costs and Attorneys Fees*. (R., 000259, R., 000263). Such award was premised upon the frivolous position maintained by the Appellant. This Court has held that an award of attorney fees under I.C. § 12-121 is not a matter of right to the prevailing party, but is appropriate only when the court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation. *McGrew v. McGrew*, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003). When deciding whether attorney fees should be awarded under I.C. § 12-121, the entire course of the litigation must be taken into account and if there is at least one legitimate issue presented, attorney fees may not be awarded even though the losing party has asserted other factual or legal claims that are frivolous, unreasonable, or without foundation. *Id.* Such a finding was made by the Court in the *Order Modifying Custody and Visitation and Judgment For Costs and Attorneys Fees*. (R., 000259, R., 000263). Appellant, like all of the issues raised in her brief, fails to cite to the record where and how the court abused its discretion in awarding fees and costs in this

matter. Simply stated, the Appellant fails to cite anywhere in the record where the Magistrate erred. Therefore, this Honorable Court must uphold the award of attorney fees in the *Order Modifying Custody and Visitation and Judgment For Costs and Attorneys Fees*. (R., 000259, R., 000263).

c. Idaho Rule Of Civil Procedure 40(c) Was Properly Complied With.

Appellant alleges the Magistrate Court should have dismissed the matter because of inactivity pursuant to I.R.C.P. 40(c) and by the Court not doing so was "That by legal definition is an "abuse of process"." Appellant's Brief, p. 17. Such argument is without merit given the record in this case. A party may not remain silent as to claimed error during a trial and later urge his objections thereto for the first time on appeal." *Hoppe v. McDonald*, 103 Idaho 33, 35, 644 P.2d 355, 357 (1982). In addition, "[s]ubstantive issues will not be considered the first time on appeal." *Crowley v. Critchfield*, 145 Idaho 509, 181 P.3d 435 (Idaho 2007). "The longstanding rule of this Court is that we will not consider issues that are raised for the first time on appeal." *Id.* Similarly, this Court has held that issues on appeal that are not supported by propositions of law or authority are deemed waived and will not be considered. *Wheeler v. Idaho Dept. of Health & Welfare*, 147 Idaho 257, 266, 207 P.3d 988, 997 (2009).

In this matter, the record is clear that Appellant failed to object to the *Note of Issue and Request For Trial Setting* and *Affidavit In Support of Retention and Trial Setting* filed by Respondent on November 27, 2009. (R., 000165, R., 000162). The *Notice of Proposed Dismissal* provided that an affidavit be filed on or by November 27, 2009, in order for the case to continue. (Appendix 1) As the record clearly reflects, the *Note of Issue and Request For Trial Setting and Affidavit In Support of Retention and Trial Setting* were filed on November 27, 2009. (R., 000165, R., 000162). Appellant's claims to this Honorable Court to the contrary are without

merit and a blatant misstatement of the record in yet another attempt to abuse the process of the courts. Therefore, Appellant respectfully requests this Honorable Court deny Appellant's claim to the contrary.

d. Proper Notice Was Given To Appellant Throughout The Course of The Proceedings.

Appellant makes claim that she was not given "actual" or "constructive" notice of anything the Respondent and his attorney did in February and March of 2009. Appellant alleges, "I was never given any notice, but for the initial summons and complaint for modification of custody served on me in February of 2009 by the County Sheriff in Colorado." Appellant's Brief, p. 15. Such a statement is clearly contrary to the record in this matter. As the *Affidavit of Service on Defendant Personally* filed by James Travis clearly indicates, the Appellant was properly served in this matter (R., 000146). Moreover, after the initial service which is reflected by the affidavit of James Travis, Appellant was served with every pleading in this matter. Such service of each and every document is reflected by each *Certificate of Service* attached to each document filed by the Respondent in this matter along with each *Clerk's Certificate of Service* filed in this matter. In the same vein, Appellant failed to raise any issue of service at anytime throughout the course of the proceedings. "The longstanding rule of this Court is that we will not consider issues that are raised for the first time on appeal." *Id.* Similarly, this Court has held that issues on appeal that are not supported by propositions of law or authority are deemed waived and will not be considered. *Wheeler v. Idaho Dept. of Health & Welfare*, 147 Idaho 257, 266, 207 P.3d 988, 997 (2009). Appellant's claims to this Honorable Court that she was not properly served are without merit and a blatant misstatement of the record in yet another attempt to abuse the process of the courts. Therefore, Appellant respectfully requests this Honorable Court deny Appellant's claim to the contrary.

e. Appellant's Frivolous Appeal Warrants Attorneys Fees Pursuant To Idaho Appellate Rule 41, Idaho Appellate Rule 11.2 And Idaho Code Section 12-121.

Under Idaho Code Section 12-121, a court may award attorney fees to the prevailing party in a civil action. I.C. § 12-121; *see also Nelson*, 144 Idaho at 717, 170 P.3d at 382. An award of fees pursuant to this section may only be made "when the court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably and without foundation." *Nelson*, 144 Idaho at 718, 170 P.3d at 383 (quoting *Balderson v. Balderson*, 127 Idaho 48, 54, 896 P.2d 956, 962 (1995) (internal quotations omitted)); *see also* I.R.C.P. 54(e)(1). Such is the case when an appellant has only asked the appellate court to second-guess the trial court by reweighing the evidence or has failed to show that the trial court incorrectly applied well-established law. *Nelson*, 144 Idaho at 718, 170 P.3d at 383. Conversely, fees generally will not be awarded when the "losing party brought the appeal in good faith and where a genuine issue of law was presented." *Id.*

Similarly, I.A.R. 11.2 directs courts to impose sanctions on parties who "violate the certification that they made when signing a notice of appeal." A signed legal document violates Rule 11.2 if (1) it is not well grounded in fact; (2) it is not warranted by existing law or a good-faith extension, modification, or reversal of existing law; and (3) it was interposed for an improper purpose. *Read v. Harvey*, 147 Idaho 364, 371, 209 P.3d 661, 668 (2009). Sanctions for violating the certification may include "an order to pay to the other party . . . the amount of the reasonable expenses incurred because of the filing of the notice of appeal . . . including a reasonable attorney's fee." I.A.R. 11.2

Last, I.A.R. 35(b)(6) requires a respondent's argument to contain "citations to the authorities, statutes and parts of the transcripts and record relied upon." This Court has held that this rule applies to requests for attorneys fees on appeal. *Weaver v. Serle Bros.*, 131 Idaho 610,

616, 962 P.2d 387 (Idaho 1998); *Samuel v. Hepworth, Nungester & Lezamiz*, 134 Idaho 84, 90, 996 P.2d 303 (Idaho 2000). This Court has also repeatedly held that a party claiming attorneys fees must assert the specific statute, rule, or case authority for its claim. *Cook v. State Dep't of Transp.*, 133 Idaho 288, 298, 985 P.2d 1150 (Idaho 1999); *Bingham v. Montane Resource Assocs.*, 133 Idaho 420, 424, 987 P.2d 1035 (Idaho 1999). Here, Respondent respectfully requests an award of attorneys fees incurred on this appeal pursuant to I.C. § 12-121 and sanctions pursuant to I.A.R. 11.2. Under I.C. § 12-121, the Appellate Courts of Idaho have repeatedly held an award of attorney's fees to the prevailing party is appropriate when the court determines the case was brought, pursued or maintained frivolously, unreasonably or without foundation. *Keller v. Rogstad*, 112 Idaho 484, 733 P.2d 705 (Idaho 1987); *Sinclair & Co. v. Gurule*, 114 Idaho 362, 757 P.2d 225 (Ct. App. 1988).

Where the issues raised on appeal involve well-settled principles of law, the appeal is frivolous and without foundation. *Blaser v. Cameron*, 121 Idaho 1012, 1018, 829 P.2d 1361, 1367 (Ct. App. 1991). The legal and factual issues raised in this appeal involve well-settled principles of child custody law which the Appellant has provided no cognizable basis for this Honorable Court to reverse positions upon. Similarly, Appellant cannot claim error when she failed to show up for trial in this matter. Such conduct cannot be condoned since a party may not remain silent as to claimed error during a trial and later urge his objections thereto for the first time on appeal. *Hoppe v. McDonald*, 103 Idaho 33, 35, 644 P.2d 355, 357 (1982). Moreover, the Appellant lacks any factual basis for bringing this appeal. Instead of litigating the issues that were before the Magistrate Court, the Appellant seeks to litigate ancillary issues before this court instead of citing to record in this appeal. Last, what appears abundantly evident throughout this appeal is Appellant has lodged this appeal for an improper purpose; that is to harass, malign and

smear the Respondent by interposing issues and documents that are clearly outside the scope of the record and issues in this case.

It is apparent from the issues presented in this appeal, the Appellant has brought, pursued and maintained a position that is without foundation and quite simply put, frivolous and without any proper purpose other than to harass Mr. Woods. As such, Mr. Woods respectfully requests this Honorable Court to not only award attorneys fees under I.C. § 12-121, but also monetary sanctions pursuant to I.A.R. 11.2 to dissuade Appellant and others from such outlandish behavior.

V.

CONCLUSION

Based upon the foregoing, the Respondent respectfully requests this Honorable Court deny Appellant's appeal in whole and grant Respondent's request of attorney's fees pursuant to Idaho Code Section 12-121 and monetary sanctions pursuant to Idaho Appellate Rule 11.2.

Respectfully Submitted this 29th day of July, 2010.

CAPITOL LAW GROUP, PLLC



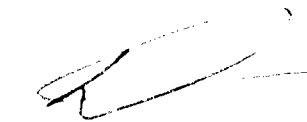
David Heida
Attorney for Plaintiff/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of July, 2010, I served a true and correct copy of the foregoing document(s) upon the following person(s), in the manner indicated:

Susan Anne Sanders Pollak
12205 Perry Street, #321
Broomfield, CO 80020

 X U.S. Mail, Postage Prepaid
 Overnight Courier
 Hand Delivered
 Via Facsimile
 CM/ECF Notice of Electronic Filing



David Heida

APPENDIX 1

NOV 13 2009

FIFTH JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF GOODING
624 MAIN STREET - P.O. BOX 477
GOODING, IDAHO 83330

2009 NOV -5 PM 12:54

RECEIVED

BY: R. Tanner
DEPUTY

DAVID HEIDA
CAPITOL LAW GROUP, PLLC.
P.O. BOX 32
GOODING, ID 83330

NOTICE OF PROPOSED DISMISSAL

Pursuant to Rule 40(c) of the Idaho Rules of Civil Procedure, notice is hereby given that in the absence of a showing, by written affidavit filed with this Court on or before 11/27/2009 at 4:00 pm, setting forth specific facts justifying retention and setting forth a specific time table for actions necessary to make the case ready for trial setting and processing the specific matters left at issue therein, all pending matters in the following case will be dismissed for inactivity on or after 11/27/2009 *✓*

CASE NO.	CASE TITLE
CV-2006-0000290	Michael Alan Woods vs. Susan Anne Sanders

Copies mailed, postage pre-paid to:

(☒) Counsel, as listed above.

Dated: November 6th, 2009
Denise M. Gill
Clerk Of The District Court

By: Rebecca Tanner
Deputy Clerk

Notice Of Proposed Dismissal